

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Kevin Hokenstrom

v.

Civil No. 04-cv-78-SM


New Hampshire Prison, Warden, et al

ORDER

Re: Document No. 40, MOTION for Certificate of Appealability

Ruling: Moot. By order dated October 31, 2008, (document no. 39), this court determined that, although couched as a motion for relief under Fed. R. Civ. P. 60(b), in fact petitioner was seeking habeas corpus relief, a matter over which this court is without jurisdiction, given that such a petition is plainly a second or successive one, and the Court of Appeals for the First Circuit had not granted prior authorization to this court to consider it. The court of appeals' clerk's office has written to this court's clerk (letter dated December 9, 2008), asking that a petition for issuance of a certificate of appealability, which petitioner apparently filed in the appeals court, be treated by this court as a notice of appeal, and, that that same petition be presented to this court for ruling in the first instance. The clerk shall docket the petition as a notice of appeal, as requested. As a petition for issuance of a certificate of appealability, however, there would seem to be nothing for this court to decide. There is no ruling on the original motion, as it was construed as a second or successive petition. Therefore, there is nothing to certify in terms of the appealability of an adverse habeas ruling, and, besides, this court, again, is without jurisdiction to even consider a second or successive petition absent prior authorization from the court of appeals (which the appellate clerk's letter of course does not constitute). If a ruling must be made, I suppose "moot" is as good as any at this point. Should the court of appeals authorize consideration of a second petition, then it will be considered. Should the court of appeals determine that the motion is properly considered as one brought under Rule 60, then it will be considered as such. In the meantime, however, all that

this court can lawfully do is, as requested, treat the "petition for certificate of appealability as a notice of appeal from the prior determination that this court is without jurisdiction over a second or successive habeas petition, and return the matter to the court of appeals for appropriate consideration. So ordered.

  
Steven J. McAuliffe  
Chief Judge

Date: January 7, 2009

cc: Keven Kokenstrom  
Counsel of Record